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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PICKANDS MATHER & CO., AS MANAGING AGENT FOR ERIE MINING CO.,
Petitioner,

v.

COMMISSIONER OF REVENUE OF THE STATE OF MINNESOTA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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QUESTIONS PRESENTED

1. Whether the Commerce Clause of the Constitution of the United States, and the Due Process Clause of the Fourteenth Amendment, forbid the State of Minnesota from apportioning to itself the entire income generated from interstate sales of subsurface minerals by a firm engaged in the mining and production of minerals for sale entirely to companies located in other States.

2. Whether this Court's decision in *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924)—that the Contract Clause of the federal Constitution (Art. I, § 10, cl. 1) bars only state *legislative* and not *judicial* actions destroying vested contract rights—should be modified with respect to contracts between the State and private parties in the light of more recent interpretations of constitutional obligations and limitations.

PARTIES

Pickands Mather & Co., as Managing Agent for Erie Mining Company, was the respondent before the Minnesota Supreme Court. The Minnesota Commissioner of Revenue and the Range Municipalities and Civic Association were relators before that Court.*

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* Pickands-Mather is a wholly-owned subsidiary of Moore McCormick Resources, Inc. Erie Mining Company is owned by its shareholders in the following proportions: Bethlehem Steel Corporation (45%); Youngstown Sheet & Tube Co. (35%); Interlake, Inc. (10%); and Stelco Coal Co. (10%).

The following companies are wholly-owned subsidiaries of Pickands Mather: Crawford Coal Company; Northwest Iron Co., Ltd.; Pickands Mather & Co. International; Pickands Erie Corporation; Robert Coal Company; Scotts Branch Co.; Syracuse Mining Company; Turner Elkhorn Mining Company; The Ashtabula & Buffalo Dock Company; Carroll County Coal Company; Detour Dock Company; Erie Dock Company; Lake State Land Company; Masabi Radio Corporation; Peninsula Land Corporation; Seigneley Resources, Inc.; Study Butte Mining Company; Taconite Contracting Corporation; Toledo Coke, Inc.

Pickands Mather possesses the following ownership interest in the following mines: Leslie Mine (20%); McInnes Mine (20%); Savage River Mines (36.2%); Scotts Branch Mine (40.8%); Wabush Mines (5.2%).

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COMMISSIONER OF REVENUE OF THE STATE OF MINNESOTA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

Petitioner Pickands Mather & Co., as Managing Agent for Erie Mining Co., prays that a writ of certiorari issue to review the judgment of the Supreme Court of Minnesota in this matter.

OPINIONS BELOW

The Findings of Fact, Conclusions of Law, Order for Judgment and Memorandum of the Minnesota Tax Court (Appendix C, App. 19a-81a) are not officially reported. The decision of the Minnesota Supreme Court, from which certiorari is sought (Appendix B, App. 2a-18a) is reported at 334 N.W.2d 155 (1983). The Order of the Minnesota Supreme Court denying petitioner's Petition

for Rehearing and Motion for Remand (Appendix A, App. 1a) is not officially reported.

JURISDICTION

The Minnesota Supreme Court's decision and judgment herein was rendered on May 13, 1983 (App. 2a). The Minnesota Supreme Court's Order denying petitioner's timely Petition for Rehearing and Motion for Remand was entered on August 16, 1983 (App. 1a). The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause of the Constitution (Art. I, § 8, cl. 3) provides, in part:

> The Congress shall have Power * * * to regulate Commerce * * * among the several States * * *.

The Contract Clause of the Constitution (Art. I, § 10, cl. 1) provides:

> No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *.

The Due Process Clause of the Fourteenth Amendment provides:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law.

Section 298.40 of Minnesota Statutes (1982) provides:

> Subsection 1. The combined occupation, royalty, and excise taxes imposed upon or required to be paid with respect to the mining, production, or beneficiation of taconite or semi-taconite by any person or corporation engaged in such mining, production, or beneficiation, shall not be increased so as to exceed the greater of (a) the amount which would be payable if such taxes were computed under the laws in existence as of July 1, 1963, or (b) the amount

which would be payable if such person or corporation were taxed with respect to such mining, production, or beneficiation under the income, franchise, and excise tax laws generally applicable to manufacturing corporations transacting business within the state, as such laws may be enacted or amended from time to time, except that for the purpose of the computation under this clause (b), (1) income shall be apportioned to Minnesota in the manner which may be otherwise specified by law; (2) operating losses shall be carried forward from one taxable year to another only to the extent which may be otherwise permitted by law; and (3) the market value of the taconite or semi-taconite, or the beneficiated product thereof, at the point where the beneficiation processes within this state are completed may be treated by law as gross receipts for the purpose of determining gross income from the business of mining, producing, or beneficiating taconite or semi-taconite, provided that if such market value is so used, to the extent that federal income taxes are deductible in computing taxes of manufacturing corporations generally, deductions shall be computed and allowed as if such taxes had been computed, assessed, and paid under the federal income tax laws with the market value of the taconite or semi-taconite or the beneficiated product thereof constituting the gross receipts for the purpose of determining gross income from the business of mining, producing, or beneficiating taconite or semi-taconite.

Subd. 2. Taxes imposed upon the mining or quarrying of taconite or semi-taconite and upon the production of iron ore concentrates therefrom, which are in lieu of a tax on real or personal property, shall not be considered to be occupation, royalty, or excise taxes within the meaning of this section.

Subd. 3. For the purpose of this section "taconite" and "semi-taconite" shall have the meaning given to them by laws in existence at the time of the adop-

tion of this section. [Laws of Minnesota 1963, Chapter 81]

Article X, § 6 of the Minnesota Constitution ("the Taconite Amendment") provides, in relevant part:

> Notwithstanding any other provision of this constitution, Laws of Minnesota 1963, Chapter 81, relating to the taxation of taconite and semi-taconite, and facilities for the mining, production, and beneficiation thereof shall not be repealed, modified or amended, nor shall any laws in conflict therewith be valid for a period of twenty-five years after the adoption of this amendment; * * *

STATEMENT

Erie Mining Company ("Erie") is a Minnesota corporation engaged in the business of mining taconite ore and producing taconite pellets within Minnesota for delivery to steel manufacturers located outside of the State.[1] Erie

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[1] Erie did not begin acquiring taconite reserves until after passage of the taconite production tax in 1941. In 1942, Erie set up a laboratory in Hibbing, Minnesota, to conduct further experimentation in taconite production, and built a 200,000 ton pilot plant at Aurora, Minnesota, in the early 1950's. Also at that time, Erie began contemplating the construction and operation of a commercial plant with a production capacity of 7.5 million tons of pellets annually. Tremendous difficulties still remained, however, including the obtainment of financing for the huge capital outlay required for the project, which was estimated to be around $354,000,000.

One of the greatest obstacles was the treatment Erie and its shareholders would receive for federal income tax purposes. The shareholders determined that the project could be feasibly undertaken only if Erie was treated for federal income tax purposes as a "cost company", *i.e.*, only if it was disregarded as a corporate taxpaying entity for *federal* income tax purposes, and the shareholders taxed for those purposes as if they were conducting the operation on a joint venture basis. The Internal Revenue Service granted this request of Erie and its shareholders by its ruling letter dated March 11, 1953, and the Closing Agreement which was attached to said letter. Throughout its history, however, Erie has always been treated as a separate entity for *all state* tax purposes.

either owns or has a leasehold interest in the property from which it mines taconite ore, and owns the severed taconite ore, processed taconite pellets, and beneficiating equipment used in processing taconite. All of this ore, property, and equipment is located within the State of Minnesota. By contrast, none of Erie's shareholders, who purchase all of Erie's taconite pellets, is located within the State. No steelmaking facilities exist within the State capable of using these pellets. The first and only beneficial use of these taconite pellets is as a raw material for the production of steel and pig iron in blast furnaces outside of Minnesota.

Since its incorporation in 1940, Erie has been a central figure in the development of the Minnesota taconite industry, which provides the background against which the issues in this case must be viewed.

A. Background.

Minnesota held a near-monopoly upon the natural iron ores used by the Nation's steel industry for the production of pig iron and steel from the turn of the century until the 1940's. By the early 1940's, however, it became apparent that this state of affairs would not be everlasting. Canvassing the situation at that time, the Minnesota legislature foresaw a substantial risk to the State's economy from the gradual depletion of the State's natural ore resources. Concerned that the inevitable exhaustion of the State's supply of iron ore would lead to a deterioration of the economy in the Iron Range regions in which iron ore was found, the legislature sought to offset that depletion by encouraging production of the State's vast but still-undeveloped reserves of taconite.

However, Minnesota's tax system, as it related to the mining industry, proved to be a severe impediment to the formation of a viable taconite industry in Minnesota. It was widely recognized that the ad valorem and occu-

pation taxes historically imposed upon the natural ore industry were greatly excessive and discriminatory when compared to the same or comparable taxes paid by other manufacturing industries. Potential taconite producers let it be known that they would not be willing to make the tremendous capital investments required to construct the taconite projects and provide the jobs so urgently sought unless they could be assured in some way that their operations would receive a more equitable tax treatment in the future.

To stimulate taconite production, the legislature in 1941 lessened the tax burden on companies engaged in taconite production, substituting a production tax on taconite for the otherwise-applicable (and more costly) ad valorem tax imposed upon the production of natural ores within the State (App. 21a-22a). Enactment of this production tax appeared to hold some promise for the State's interest in developing a taconite production industry: within ten years both Erie Mining Co. and Reserve Mining Co. had developed taconite production plants and were in the process of producing taconite pellets for use in iron and steel production (*id.* 22a). At the same time, Minnesota's near-monopoly upon iron ore production remained strong throughout the 1940's and 1950's (*id.* 30a).

But by the early 1960's the State's natural ore industry began to experience a far more rapid decline than had been predicted twenty years beforehand and for entirely different reasons. The deteriorating position of the Minnesota iron ore industry was due not to the exhaustion of the iron ore reserves, but to competitive factors such as the expansion of the world supply of iron ore, mining in other States, the development of substitutes for iron and steel, and the substitution of the technologically-superior taconite for iron ore in steel production (*id.* 28a-32a). As a result, the predicted consequences of the demise of the iron ore industry gradually began to ripen and had a

devastating effect on the economy of the Mesabi Range communities in which iron ore was found (*id.* 33a-34a). The state legislature concluded that a dramatic expansion of the taconite industry was the greatest hope for the economic salvation of the Range (*id.*).

The legislature also recognized, however, that the private market was not likely automatically to respond to the increasing demand for taconite, and thereby shore up the State's deteriorating economy. Private investors were unlikely to invest the huge sums necessary for augmenting the State's nascent taconite industry because of the discrimination suffered by mining companies under the existing tax system. Under Minnesota law, mining companies had historically been subject to an "occupation" tax rather than an "income" tax, and had been taxed at a rate twice that applicable to non-mining companies in the State (*id.* 26a).[2] Numerous legislative studies con-

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[2] Mining companies in Minnesota had historically been subject to an occupation rather than an income tax. There are material differences between the two, principally with respect to items that may be consider ' as deductions. Many expenses allowed as deductions for income tax purposes are not allowed as deductions for occupation tax purposes, with the result being that the occupation tax is far more burdensome than the income tax.

The occupation tax is also computed differently from the income tax. The occupation tax is imposed against the value of mined or produced taconite measured where the ore is brought to the surface (known as "the value at the mouth of the mine") less certain statutory deductions relating to the costs of mining the ore (App. 25a-26a; see also Minn. Stat. §§ 298.03(1)-(6)). The method historically employed by the Minnesota Commissioner of Revenue to determine the value at the mouth of the mine is as follows.

The Commissioner subtracts from the published Lake Erie price (representing the actual fair market value of the ore delivered at lower Lake Erie ports) certain expenses necessarily incurred beyond the value at the mouth of the mine that would be reflected in the published Lake Erie price. These expenses, known as "non-statutory deductions," chiefly consist of items such as allowances for stockpiling and loading costs, beneficiation costs, transportation

firmed that the discretionary nature of the state tax system was a prime cause of the declining market share that Minnesota held in the world taconite market (*id.* 26a-32a),[3] and proposed a modification of the tax laws as the remedy for this problem (*id.* 33a-34a, 65a-66a). The legislature responded to these recommendations by capping the tax burden on taconite producers in the form of the legislation at issue in this case.

B. Taconite Amendment.

In order to rectify the discriminatory effect of the existing tax system with respect to mining companies and to assure potential investors in the taconite industry of fair treatment, the Minnesota legislature in 1963 adopted Minn. Stat. § 298.40 to equalize the tax treatment of the taconite industry (pages 2-3, *supra*). Section 298.40 in essence established a two-part formula for limiting, inter alia, the state occupation tax. Under this section, a taconite company's occupation taxes could not exceed the greater of (a) the occupation taxes payable under the

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and marketing costs, and certain other miscellaneous expenses (*id.* 26a). After the Commissioner calculates these non-statutory deductions, he takes the statutory deductions noted above to arrive at the taxable value of the ore. This value is taxed at the occupation tax rate (15% under Minn. Stat. 298.01) to determine the gross tax. Certain credits are then applied against the gross tax to arrive at the net amount of tax due, which the taxpayer must pay (*id.*).

[3] Principally because of the unfavorable tax climate which had been applied to the natural ores, there was a great fear that the expansion of the taconite industry so strongly coveted by Minnesota was occurring elsewhere. One union official expressed his extreme concern in this regard as follows:

> There is no question but what taconite or semi-taconite and high grade ore concentrates are replacing Minnesota iron ores in the making of steel. Minnesota produced these processes but the records show other states and other countries have taken advantage of these processes and are gradually moving Minnesota out of the market. [Exhibit 81 before the Tax Court.]

occupation tax laws in existence as of the effective date of Section 298.40 (*i.e.*, 1963), or (b) the taxes paid by non-mining companies, which were subject to an income rather than an occupation tax. In this way, taconite mining companies were assured that they would not be subject to more onerous taxation than that levied upon non-mining companies in the State.

Further to assure taconite investors that the legislaure would not thereafter reinstate the discriminatory tax system in place prior to the enactment of Section 298.40, the Minnesota legislature proposed, and the people of the State at a general election overwhelmingly approved, an amendment to the state constitution forbidding the legislature from repealing or modifying Section 298.40.[4] This amendment, known as the Taconite Amendment, fixed for a period of twenty-five years the benefits to taconite mining and production firms (like Erie) provided by Section 298.40 as an inducement to investment in the Minnesota taconite industry.

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[4] The proposed Taconite Amendment, which was required to be ratified by the people of the State, received wide support. Among those prominent individuals supporting passage of the amendment were Governor Rolvaag, former-Governor Elmer Anderson, Oscar R. Knutson, Chief Justice of the Minnesota Supreme Court, the late Senator Hubert Humphrey, then-Attorney General Walter Mondale, Doctor Charles Mayo, and a host of other business, political, labor, and religious leaders. It was endorsed by literally hundreds of groups representing almost every facet of Minnesota's social and cultural life, including both major political parties, professional associations, chambers of commerce, fraternal organizations, social clubs, educational groups, business groups, cities, county boards, and many others. Because of this broad-based support, the Taconite Amendment was overwhelmingly approved by a legislative vote of 177 to 13 and subsequently by more than 80% of the voters at the general election held in November 1964, and is now incorporated into the Minnesota Constitution as Article X, Section 6.

It is manifest that the Taconite Amendment was proposed by the legislature and approved by the people as an inducement to taconite producers to locate in Minnesota. As the Tax Court found in holding that the Commissioners had erred in assessing Erie $1.6 million more than Erie would be taxed if taxed as a non-mining Minnesota manufacturer: "[t]he purpose of said legislation and Taconite Amendment was to provide incentives, assurances, and legal commitments to encourage investors to build and operate new taconite production facilities and to continue and expand existing taconite facilities in Minnesota" (App. 36a). In so doing, the Taconite Amendment, as the Minnesota Supreme Court has itself recognized (*Reserve Mining Co.* v. *State*, 310 N.W.2d 487, 493-494 (1981)), created a contract between the State and taconite mining companies, such as Erie, for purposes of the Contract Clause of the federal Constitution (Art. I, § 10, cl. 1).[5]

The issues presented by this petition arise out of the State's efforts to avoid the binding effect of this contract.

C. The Proceedings Below.

In determining Erie's occupation tax liability for the year 1974, respondent Commissioner of Revenue refused to apply the Taconite Amendment. Thus, none of Erie's net income from its taconite sales for that year were apportioned to transactions in interstate commerce but were, instead, treated as if those transactions took place wholly intrastate.

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[5] Following the adoption of the Taconite Amendment and during the initial establishment of Erie's operations, no significant statutory changes increasing the amount of occupation and royalty taxes payable by the taconite industry were made until 1971. In 1971, however, the legislature increased the rate of both the occupation tax and the royalty tax on taconite from 12 percent to 15 percent (Laws of Minn. 1971, Ex. Sess. c. 31, art. 4). In 1974, occupation taxes on taconite were further increased through limitation of the deductions for interest on plant investment and shrinkage (Laws of Minn. 1974, c. 556).

On appeal, the state Tax Court rejected the Commissioner's contention, concluding that, under Section 298.40, Erie was entitled to the same apportionment of its income as is applicable to a non-mining company taxed under the general income laws (App. 73a-77a). The Tax Court further concluded that Erie's transfer of taconite to its shareholders must be treated as sales.[6]

On the Commissioner's appeal, the Minnesota Supreme Court reversed. The court concluded, first, that Section 298.40 did not require apportionment. The court interpreted that section simply to permit the state legislature thereafter to adopt an apportionment formula for taconite companies, rather than to incorporate the existing apportionment formula unless and until the state legislature so acted (*id.* 10a-11a). Contrary to the Tax Court's conclusion, the court hypothesized that the legislature may have intended to deny companies such as Erie apportionment *because* of their status as cost companies (*id.* 12a). Since apportionment is available only where a company sells tangible, personal property delivered or shipped to an out-of-state purchaser, the apportionment statute was inapplicable to cost companies which, the court claimed, did not "sell" goods and, instead, simply transferred goods at cost from one entity to another (*id.* 13a).

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[6] This was so because Section 298.40 subd. 1(b)(3) attributed gross receipts to Erie, a cost company under the federal tax laws, which, by definition, could not have gross receipts in excess of production costs (which are deductible) without receiving revenue from sales (App. 78a). That being so, the only sales possible in this case were sales with a destination outside of Minnesota because there were no smelting facilities within the State (*id.*). The contrary conclusion, the Tax Court wrote, was illogical because it would deny taconite cost companies—the only type of taconite mining companies operating commercially in Minnesota when the Taconite Amendment was adopted—the benefit of the apportionment to which other taconite companies commencing operation after 1964 and all non-mining companies would be entitled (*id.* at 78a-79a).

STAGES AT WHICH THE FEDERAL QUESTIONS WERE RAISED AND PRESERVED

Petitioner raised its due process argument at its first opportunity when it appealed to the Tax Court the adverse ruling by the Commissioner of Revenue. Petitioner did not thereafter argue either portion of Question 1 before the Minnesota Supreme Court in the appeal taken against it by the Commissioner, although it did so in its Petition for Rehearing and Motion for Remand. It submits that this Court has jurisdiction to correct the plain error committed by that court in respect to Question 1. See, *e.g.*, *Vachon* v. *New Hampshire*, 414 U.S. 478 (1974) (*per curiam*). Petitioner could not have raised the second question presented by this petition in the state courts, because those courts could not have overruled a decision of this Court. See, *e.g.*, *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 103 S. Ct. 1343, 1344 (1983) (*per curiam*).

REASONS FOR GRANTING THE PETITION

The decision of the Minnesota Supreme Court nullified the State's solemn contract with instate taconite mining companies set forth in the state constitution. The contract guaranteed that these companies' investment of literally hundreds of millions of dollars would not be subjected to the discriminatory tax treatment such companies had suffered prior to the Taconite Amendment.[7] That amend-

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[7] A more precise quantification of the Tax Court's figures (App. 36a-39a) follows:

MINNESOTA'S TACONITE PLANTS

Taconite Facilities in Operation Prior to the Passage of the Taconite Amendment in 1964	*Annual Production Capacity*	*Estimated Investment*	*Employment at Rated Capacity*
Reserve Mining Company	6,600,000 tons	$ 190,000,000	2,500
Second Project	3,300,000 tons	120,000,000	
Erie Mining Company	7,500,000 tons	300,000,000	2,400
Pilotac (U.S. Steel)	750,000 tons	50,000,000	325
Total to 1964	**18,050,000 tons**	**$ 660,000,000**	**5,225**

ment, passed to shore up a failing state economy by assuring potential and existing investors that a set, two-part formula would thereafter be employed to cap the occupation taxes levied upon mining companies in lieu of income taxes, created a binding contract within the meaning of the Contract Clause of the federal Constitu-

Taconite Industry Growth, Phase Following Taconite Amendment: 1964-1974	*Annual Production Capacity*	*Estimated Investment*	*Employment at Rated Capacity*
Reserve Expansion	1,000,000 tons	$ 50,000,000	500
Erie Mining Expansion	3,500,000 tons	50,000,000	350
Minntac (U.S. Steel)	11,750,000 tons	225,000,000	3,200
Eveleth Taconite	2,300,000 tons	45,000,000	546
Butler Taconite	2,650,000 tons	66,000,000	600
National Steel Pellet	2,600,000 tons	90,000,000	600
Total Added 1964-1974	**23,800,000 tons**	**$ 526,000,000**	**5,796**
Taconite Industry Growth, Phase Beginning in 1974			
Inland Steel Mining Co.	2,600,000 tons	$ 150,000,000	570
Hibbing Taconite Co.	8,100,000 tons	360,000,000	1,250
Minntac Expansion	6,000,000 tons	200,000,000	1,000
Eveleth Expansion	3,600,000 tons	315,000,000	854
National Steel Pellet Exp.	3,200,000 tons	150,000,000	400
Total Added Since 1974	**23,500,000 tons**	**$1,175,000,000**	**4,074**
Company-by-Company			
Reserve Mining Company	10,800,000 tons	$ 360,000,000	3,000
Erie Mining Company	11,000,000 tons	350,000,000	2,750
Minntac (U.S. Steel)	18,500,000 tons	475,000,000	4,200
Eveleth Mines	5,900,000 tons	360,000,000	1,400
Butler Taconite	2,650,000 tons	66,000,000	600
National Steel Pellet	5,800,000 tons	240,000,000	1,000
Inland Steel Mining Co.	2,600,000 tons	150,000,000	570
Hibbing Taconite Co.	8,100,000 tons	360,000,000	1,250
Total	**65,350,000 tons**	**$2,361,000,000**	**15,095**

tion (Art. I. § 10, cl. 1) between the State and taconite mining and production companies, including petitioner (see page 10, *supra*). In so doing, the Taconite Amendment basically equalized the tax positions of the taconite and other mining companies operating throughout the State, which have historically been subject to an occupation tax, with the tax position of the State's nonmining companies, which are subject to an income tax.

The tortured construction of the tax formula incorporated into the Taconite Amendment by the court below not only produces a result antithetical to the purpose for which the Taconite Amendment was adopted, but it also singles out a small, but clearly identifiable, class of businesses, operating, by necessity, in interstate commerce, for discriminatory treatment solely because of the interstate character of their business. Under two allied lines of decisions of this Court, culminating in *Container Corp.* v. *Franchise Tax Board*, 103 S. Ct. 2933 (1983), on the one hand, and *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981), on the other, blatant discrimination of this type imposed on businesses engaged in interstate commerce cannot pass constitutional muster. Reliance upon Erie's cost company status to characterize its interstate transactions as mere "transfers" rather than "sales" of goods cannot avoid the command of the Due Process and Commerce Clauses in this regard. Even under the "transfer" theory, the State cannot tax value earned beyond its borders, much less do so simply *because* some of that value is earned outside of Minnesota.

But if the Minnesota Supreme Court's legerdemain is somehow sufficient to escape the commands of the Due Process and Commerce Clauses, then that result calls into question the rationale underlying this Court's ruling in *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924), that only the state legislature, and not the state judiciary, can violate the Contract Clause of the federal Constitution. For the evils at which the Contract Clause were

addressed can surely come about through judicial invalidation of one of the State's covenants as easily as by legislative repudiation, and the fact that the State refuses to abide by its bargains through the one route rather than through the other scarcely offers any succor to a party who has invested millions of dollars based upon the State's contract *simpliciter*. The decision below manifests the dangers to which parties such as petitioner can be subject if the formalistic rule employed in *Tidal Oil Co.* is permitted to shelter the State's broken promises, and justifies a re-examination of this area in light of the Court's intervening precedents questioning the foundation for that rule.

1. The Due Process Clause imposes a limit upon a State's authority to tax income of a business operating in interstate commerce that is derived from transactions taking place beyond the state line. As the Court noted only two Terms ago, "a State may not tax value earned outside its borders." *ASARCO, Inc.* v. *Idaho State Tax Comm'n*, 102 S. Ct. 3103, 3109 (1982). See also *Container Corp.*, 103 S. Ct. at 2939. The Commerce Clause imposes a like obligation (see, *e.g.*, *Container Corp.*, 103 S. Ct. at 2940), but also requires that the state tax "not result in discrimination against interstate or foreign commerce." *Id.* at 2943. See also *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 444 (1980). In this case, the Minnesota Supreme Court, by refusing to treat any part of the income generated by Erie's transfer in interstate commerce of its taconite pellets to out-of-state parties as value earned outside of the State's borders, plainly failed to heed the commands of both Clauses.

(a) The central flaw in the decision below is the court's failure to recognize that the interstate transfer of taconite, the event upon which the occupation tax is levied (see note 2, *supra*), generates income for Erie only because of the interstate character of the transfer. Erie's mining and beneficiation facilities are located

within Minnesota, as are (of course) the properties from which the taconite ore is extracted. By contrast, all of the facilities in which taconite can be used are *outside* of the State. Hence, whether this transfer may technically be characterized as a "sale" under state law—a conclusion which, of course, does not bind this Court as a matter of federal constitutional analysis (see, *e.g.*, *Container Corp.*, 103 S. Ct. at 2945-46, and cases cited therein; cf. *Aloha Airlines, Inc.* v. *Hawaii Director of Taxation*, 52 U.S.L.W. 4001, 4003 (U.S. Nov. 1, 1983))—does not wholly determine the inquiry under the Due Process Clause. For even where the corporation upon whom the tax is levied can legitimately be treated as a "unitary business" operating across state lines—which, for these purposes, is the only tenable reading of the Minnesota court's reliance upon the "cost company" character of Erie's operations—the State is nonetheless bound fairly to apportion the entire net income of the corporation with respect to its intrastate and *interstate* activities. See, *e.g.*, *Container Corp.*, 103 S. Ct. at 2942; *Exxon Corp.* v. *Wisconsin Dep't of Revenue*, 447 U.S. 207, 219 (1980); *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. at 436-437. And if Erie is to be treated as an interstate corporation because of its cost company status, then at least *some* of its income must be attributable to the value received by its non-Minnesota shareholders by virtue of their sales and expected sales following the processing of taconite into pig iron or steel.

Hence, if the Minnesota Supreme Court were correct that this transfer is not a sale, then it must follow that the statutory basis must simply represent the income attributed to one stage in the process of producing steel. That steel is manufactured by Erie's shareholders, all of whom are non-Minnesota corporations, thereby requiring at least *some* apportionment to reflect the value earned outside of Minnesota. See, *e.g.*, *Container Corp.*, 103

S. Ct. at 2939; *ASARCO*, 102 S. Ct. at 3109. The court below, however, did not even begin to make this inquiry.

(b) On the other hand, if, as we believe, the transactions at issue clearly *do* constitute a sale of taconite, then the Minnesota Supreme Court's failure to apportion the resulting proceeds with respect to their intrastate and interstate character not only ignores the Court's decisions in the line of cases culminating in last Term's *Container Corp.* decision, but also fails to respect the *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), and *Commonwealth Edison Co.* line of cases. For, while *Complete Auto Transit* and *Commonwealth Edison* have eliminated the ancient proposition that a State may not at all tax goods that have entered into the stream of interstate commerce, the very narrowest proposition which these cases have established is that a State may not tax goods in that stream without first fairly apportioning the intrastate and interstate facets of those goods in a manner that does not discriminate against interstate commerce. See *Commonwealth Edison*, 453 U.S. at 617; *Complete Auto Transit*, 430 U.S. at 279.

Yet the Minnesota Supreme Court, under the mantle of statutory construction, has clearly denied to taconite mining companies, alone of all the companies, mining and otherwise, operating within the State, any apportionment. And taconite companies are denied apportionment notwithstanding the undisputed fact that the only first use of taconite is one that can be made outside of Minnesota. For not only are there no smelting plants within the State capable of using taconite in pig iron and steel production —a fact which was universally recognized at the time the Taconite Amendment and Section 298.40 were adopted, and which is undeniable even today—but, as the Minnesota Supreme Court itself recognized (App. 4a), all of

Erie's taconite production is necessarily purchased by its non-Minnesota shareholders.

That being so, the Minnesota Supreme Court's interpretation, which denies apportionment to a readily identifiable class of business which can operate *only* in interstate commerce, so plainly violates the Commerce Clause as interpreted in *Complete Auto Transit* and *Commonwealth Edison* as to demonstrate the invalidity of its conclusion that these transfers are not sales. That court's failure to give any, much less serious, consideration to the discrimination against the interstate nature of Erie's transactions, however, cannot serve to avoid the requirements of this Court's Commerce Clause precedents.

2. In *Tidal Oil Co.*, this Court gave a literal interpretation to the Contract Clause in ruling that its language that "No State shall * * * *pass any* * * * *Law* impairing the Obligation of Contracts * * " (emphasis added) confined its scope to legislative, and not judicial, actions impairing vested contract rights. 263 U.S. at 451. The Court has not re-examined that doctrine in any depth since the 1920's. The instant case squarely presents a vehicle for such a re-examination.

(a) Subsequent events demonstrate that the judicial exemption will no longer stand analysis. Since *Tidal Oil Co.*, the Court has recognized that the Framers did not intend their particular syntax forever to freeze the development of federal constitutional law into the four corners of their chosen language. For instance, the First Amendment clearly provides that *only* Congress "shall *make no law* * * * abridging the freedom of speech * * *" (emphasis added). Yet less than a year after *Tidal Oil Co.* was handed down, the Court ruled that parties were entitled to protection from State as well as federal nullification of the right to "freedom of speech," notwith-

standing the fact that the Framers had limited the scope of the First Amendment to actions by *Congress* alone. See *Gitlow* v. *New York*, 268 U.S. 652, 666 (1925).[8] Similarly, the Court had clearly ruled by 1923 that the Ex Post Facto Clause of the Constitution was applicable only to legislative, not judicial, actions. See *Frank* v. *Mangum*, 237 U.S. 309, 344 (1915). But it later acknowledged that this distinction was constitutionally unsound. It ruled that the Due Process Clause of the Fifth and Fourteenth Amendments forbade retroactive *judicial* expansion of the scope of a criminal statute that would violate the Ex Post Facto Clause if accomplished by a legislature. See *Marks* v. *United States*, 430 U.S. 188, 191-192 (1977); *Bouie* v. *City of Columbia*, 378 U.S. 347, 353-354 (1964). The Court in *Bouie* and *Marks* rejected as unsound the rationale relied upon in *Frank*—which constituted the same rationale relied upon in *Tidal Oil Co.* (compare *Frank*, 237 U.S. at 344, with *Tidal Oil Co.*, 263 U.S. at 451), as this Court recognized in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 680-681 n.7 (1930). This Court's decisions in *Bouie* and *Marks* therefore demonstrate the unsound analysis employed in *Tidal Oil Co.*

Moreover, the decision in *Tidal Oil Co.* cannot be defended upon the ground that the Framers' concerns are inapplicable to judicial lawmaking. In light of the now-indisputable proposition that the States are "free to allocate the lawmaking function to whatever branch of state government they may choose" (*Minnesota* v. *Clover Leaf*

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[8] See also *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (First Amendment Free Exercise Clause applicable to the States); *Everson* v. *Board of Education*, 330 U.S. 1 (1947) (First Amendment Establishment Clause applicable to the States); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963) (First Amendment right peacefully to assemble and petition government for redress of grievances applicable to States); cf. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954) (Equal Protection principles of Fourteenth Amendment applicable to federal government under Fifth Amendment Due Process Clause).

Creamery Co., 449 U.S. 456, 461 n.6 (1981)), it cannot be gainsaid that the state judiciary may engage in the very same lawmaking function that *Tidal Oil Co.* apparently assumed would be performed by the state legislature alone. Hence, whether this Court's decision in *Tidal Oil Co.* is seen as resting upon the plain language of the Contract Clause or the assumption that its language was addressed to a problem capable of arising in only one fashion, that basis is no longer tenable in light of the Court's contemporary precedents.

There is simply no justification for permitting the state judiciary to shield the state treasury from the State's voluntarily-assumed obligations to private investors. For, if the state legislature may not sacrifice a party's contractual rights to satisfy its own interests (see *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977)), then surely the state judiciary, which is equally bound to honor the federal Constitution (see *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816)), surely stands on no stronger constitutional footing when it elects to do so. It can hardly be claimed that the authority to repudiate a State's covenants is an indispensable element to a sovereign state judiciary, since neither the federal government (see *Lynch* v. *United States*, 292 U.S. 571 (1934)) nor the President himself (cf. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 753-754 (1982)) may repudiate the contracts of the United States with impunity. The very existence of the Contract Clause demonstrates the Framers' insistence that the States must keep their word, and there is surely no legitimate interpretation of the purposes of the Contract Clause which would recognize that a limit upon the state legislative power is less intrusive than a comparable limit upon the state judicial power. To hold otherwise would be to carve out a safe harbor for the state judiciary for this one matter alone, a result plainly at odds with the purpose for which the Contract Clause was adopted.

(b) The decision below also highlights the dangerous consequences of a pedantic approach to federal constitutional analysis. The harm befalling investors such as petitioner, who have pumped hundreds of millions of dollars into a deteriorating state economy because of the State's promise of equal treatment, is scarcely any the less severe simply because the state Supreme Court chose to ignore or abrogate a state constitutional amendment rather than rely upon the legislature itself explicitly to disavow its promise. For, as the opinion of the state Tax Court makes clear and the opinion of the state Supreme Court nowhere denies, the legislature and people of Minnesota adopted Section 298.40 and the Taconite Amendment precisely to assure taconite production companies that they would be taxed no more harshly than nonmining companies similarly operating in interstate commerce. Because the Contract Clause would surely invalidate any effort by the legislature to rob petitioner of the benefits of its bargain with the State (see *United States Trust Co.*, 431 U.S. at 26), only a construction of the Contract Clause that is oblivious to the role state courts play in "pass[ing] * * * Law[s]" would invalidate the one while approving the other. We respectfully urge the Court to rule that the syntax of the Clause does not exert such hegemony over its meaning as to permit the States to violate its plain command simply by shifting responsibility from one branch of state government to another.

Here, the Minnesota Supreme Court readily acknowledged that a contract exists, one in which every word was carefully scrutinized before $1.8 billion was invested in reliance thereon. The objective clearly advanced and adopted in the Taconite Amendment was to assure parity between mining and non-mining corporations during its 25-year limitation. This was not simply surmise by the taconite mining companies. Public officials, including the Attorney General of the State, formally assured the vot-

ers prior to passage of the Taconite Amendment that this was precisely what the amendment would accomplish (see App. D, 81a-82a).[9]

Nine years into the 25-year limitation period, the Minnesota legislature decided, again in the State's self-interest,[10] to amend the apportionment formula so as to encourage investment in Minnesota by corporations carrying on business within and without the State. The formula authorized Minnesota manufacturing corporations to apportion a part of their net income derived from sales made outside Minnesota. In concluding that petitioner is not entitled to use the same apportionment formula, the Minnesota Supreme Court destroyed any concept of the continuing parity envisioned by the drafters of the contract. Parity means just that—a comparable level, up or down. Yet the court below denied petitioner the very parity the Taconite Amendment guaranteed, in a manner no less unlawful than if the legislature itself had done so.

We urge the Court so to rule.

3. The historical record in this case presents the Court with an invaluable opportunity to reconsider its ruling in *Tidal Oil Co.* That record clearly shows that the Taconite Amendment was specifically intended to equalize the treatment of mining and nonmining companies, and the decision below, which ignores that purpose, therefore

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[9] The Attorney General's statement of the purpose and effect of the Taconite Amendment was, by statutory requirement, distributed throughout Minnesota, widely published in every legal newspaper, and, in conspicuous poster form, prominently displayed in every polling place on election day. See Minn. Stat. § 3.21.

[10] The Minnesota Supreme Court has noted: "Tax avoidance aside, the legislature also had apparent concerns about uniformity with other states to make Minnesota more attractive to business." *Olympia Brewing Co.* v. *Commissioner of Revenue*, 326 N.W.2d 642, 645 (1982).

epitomizes the problems that can result from the *Tidal Oil Co.* decision.

Furthermore, this case is far more than just a test case for the numerous taconite companies in Minnesota (see App. 3a). The adoption of economic guarantees, encouraging in-state investment, as part of a State's own constitution is a development worth preserving.[11] If the state judiciary may erase the State's covenants by fiat, private investors will surely be unwilling hereafter to invest the millions of dollars Erie and similar companies have done in Minnesota in the gamble that the state judiciary will honor the bargain that the state legislature is constitutionally forbidden to breach.

Finally, it cannot be denied that the rule of *Tidal Oil Co.* establishes an anomaly in contemporary constitutional analysis. In no other area of current constitutional doctrine are the decisions of the state judiciary shielded from federal constitutional scrutiny. The decision below therefore offers the Court the opportunity to re-examine this antediluvian principle and thereby eliminate the unjustified favoritism accorded the state judiciary by *Tidal Oil Co.*

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[11] Referring to a prior constitutional amendment relating to mining, a unanimous Minnesota Supreme Court observed that "[t]he utilization of these ores was of tremendous importance to the prosperity of the state and in time of war to the safety of the nation. To encourage their utilization was a legitimate public purpose." *Lyons* v. *Spaeth*, 220 Minn. 563, 570, 20 N.W.2d 481, 485 (1945).

CONCLUSION

The difficult competitive and economic conditions confronting taconite companies today are no less compelling than those existing at the time of the adoption of the Taconite Amendment. Minnesota's taconite companies are operating at less than one-third of capacity, and employment is similarly reduced. The Minnesota Supreme Court should not be permitted to eviscerate the intent of the Amendment and thereby add new burdens to the Iron Range region's struggle for survival.

The petition should be granted.

Respectfully submitted,

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